BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of: **REMINGTON LODGING & HOSPITALITY, LLC, d/b/a THE SHERATON ANCHORAGE HOTEL,** Charged Party, and **UNITE-HERE! LOCAL 878, AFL-CIO,** Charging Party.	Case nos. 19-CA-32599, et.

RESPONDENT'S REPLY TO
THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS

STOKES WAGNER HUNT MARETZ & TERRELL

s/ Karl M. Terrell
3593 Hemphill Street
Atlanta, Georgia 30337
Telephone: (404) 766-0076
kterrell@stokeswagner.com

Counsel for Remington Lodging & Hospitality, LLC

A. **The Board Should Reject the General Counsel's Argument That the ALJ's Remedy Related to Seniority Violations is Not Overbroad**.

The Acting General Counsel maintains that hotel-wide discontinuance of seniority was proven. The evidence does not support this because, first, scheduling was done department by department, and second, there is no evidence of seniority discontinuance in any department other than in banquets, together with isolated incidents in the restaurant. While the AGC did prove the specific allegations at paragraph 26(a) and (b) of the Third Amended Complaint – that four named banquet servers [1] and two named restaurant servers lost shifts and hours – the AGC failed to prove the broader, nonspecific allegation at paragraph 28(e), that Respondent "ceased assigning work and ceased scheduling employees according to seniority." There is simply no evidence, however, that seniority was dishonored in any other departments:

- Five housekeeping department employees were called to testify. As reviewed at pages 43-46 of Respondent's supporting brief, although counsel for the AGC attempted to elicit testimony of seniority discontinuance in that department, in support of paragraph 28(e), she was completely unsuccessful.
- There was no evidence presented of seniority discontinuance in the engineering department, other than Dexter Wray's blatant lie to the contrary, as reviewed at pages 1-4 of Respondent's supporting brief (and briefly reviewed in the next section to follow).
- One representative of the bellman department testified, Troy Prichacharn. As pointed out in Respondent's brief, at page 42, he gave no testimony of seniority discontinuance in that department. *See*, Prichacharn testimony at Tr, pp. 1545-1644.

[1] Gavin, Littau, Fields and Williams. The Complaint originally listed a "Susan Johnson," who never testified. Counsel for the AGC amended the Complaint, dropping Susan Johnson and adding Williams, who did testify. [Tr., pp. 3089-91].

- No kitchen department employees were called to testify, and there was no other proof of seniority discontinuance in that department.
- No front desk department employees (inclusive of PBX and reservations) were called to testify, and there was no other proof of seniority discontinuance in that department.

Because seniority is by department, and because there is no proof of seniority discontinuance in any department – other than with respect to the four employees in banquets and the two in the restaurant – the ALJ's remedy overreaches. Respondent should not be put to the task, in the compliance stage, of having to prove there was no loss of compensation in these departments when the AGC failed to prove the occurrence of violations in those departments.

B. <u>Dexter Wray Was Proven to be a Liar</u>.

Counsel for the General Counsel effectively concedes Dexter Wray did in fact lie when testifying his department head violated his seniority rights by cutting his hours from 40 to 32 in the first two to four weeks of July 2010 (on July 5, on the immediate heels of the July 2 withdrawal of recognition). The counsel's only argument is buried in a footnote – footnote 3, at page 5 – and fails to address the actual testimony given by Wray, and fails to address the overwhelming evidence proving his lie. Wray was quite specific in his testimony: On July 5, "[e]verybody's hours [in engineering] got cut back to 32." That is simply a falsehood, as shown by the schedules (**Exhibit-34),** the timecards (**Exhibit R-42**) and the payroll records (**Exhibit GC-136(n)** and **(o)**). *See*, Respondent's brief, pp. 2-4. These records all reflect Wray continued to receive 40 hours – with the *de minimis* exception of two weeks at 39.75 hours.[2]

[2] One week in August showed "37 hours," but that was well *after t*he "two to four weeks of July," which is when Wray said he was "cut back to 32."

Counsel in her footnote references the ALJ's comment in response to the schedule/timecard/payroll evidence: "This is hardly the 'bald faced lie' counsel accuses Wray of." So, … if not 'bald faced,' what is it? Just a *regular* lie; one that should be deemed acceptable? The counsel's speculation in the footnote that perhaps Wray was referring to being "cut back" in overtime misses the point (plus, there is no evidence of this): Wray specifically testified he was "cut back to 32" hours. Counsel then states: "Given the record evidence as a whole, Respondent's arguments do not call into question the ALJ's credibility findings." Unfortunately, for this argument, the record evidence contains too many additional, and clear, examples of Wray lying under oath. He lied about being denied a request for *Weingarten* rights (Respondent's brief, pp. 9-10). He lied in the face of overwhelming testimony that his use of vulgar language occurred in the "back of the house." (Respondent's brief, p. 11). He lied in his denial that he was "playing poker" in the engineering office, when in fact – two days after the incident – he gave a statement to his union representative, incorporated into his *Jencks* affidavit, admitting that he was indeed "playing poker," contrary to his trial testimony that he was only "transferring chips. (Respondent's brief, pp. 20-21). And he quite plainly lied in his testimony – discussed at page 14, n. 6, of Respondent's brief – when he embellished his testimony concerning what he said immediately after stating the word "shit" in front of a manager. The contemporaneous email memo by the manager (**Exhibit R-23**) stated that Wray's next words were, "You didn't hear that," in an obvious, logical reference to his utterance of the word "shit." At trial, though, he claimed he said, "You didn't hear the part *union."* (Tr., p. 324). There is nothing, however, in the contemporaneous email of the manager, or in the testimony of John Cain and Ed Emmsley, or in any of the surrounding circumstances, that suggest Wray was at the time talking about the union or that there was some union-related topic afoot that would lead

Wray to make such a statement. The truth is Mr. Wray was simply attempting, while testifying in front of an NLRB ALJ, to gild the lily – to embellish the story of union animosity. He should not be believed.

The ALJ went out of his way to find an 8(a)(3) violation in the disciplines and discharges of Dexter Wray. He did so by willfully refusing to correctly weigh the evidence supporting the facts Wray lied multiple times on the witness stand. This Board, on *de novo* review, should see these lies for what they are, and weigh them appropriately as falsehoods in considering all of the evidence. When all of the evidence is considered, this Board should reject the ALJ's recommendation of an 8(a)(3) violation regarding Wray.

C. <u>Dexter Wray was appropriately disciplined related to the lobby pool incident</u>

The AGC states repeatedly that the trainee, Sam, was proven to have refilled the pool. The ALJ, similarly, states at page 31 of his decision that Sam "took it upon himself to fill the pool without Wray's knowledge." This was not proven, however. It appears in the record only by way of Wray's speculation. Wray admitted the last time he even saw Sam was at 3:00 am, when he showed him how to drain the pool, and that he "didn't know anything else about what was going on with this pool until 7:00 am," when he was informed by a radio call that it was flooding. [Tr., p. 390]. Nowhere in Wray's testimony does he testify to knowledge that Sam was in fact responsible.

Counsel concedes, though, by way of *arguendo* (brief, p. 11), that the discipline of Wray was not inappropriate. This concession is nearly impossible to avoid given the undisputed evidence that (1) it was Wray's job that evening to drain, clean and refill the pool, as well as train Sam on these tasks; (2) he knew Sam had not been trained on how to refill the pool; (3)

Wray drained the pool at 3:00 am, and then abandoned the project; and (4) his admission he never taught Sam how to refill the pool. [Tr., p. 305]. Counsel nonetheless argues, in the face of this unavoidable concession, that the discipline was unfair because Sam was not also disciplined. First, there is again no evidence Sam caused the damage by attempting on his own to fill the pool; second, Sam was the trainee; and third, it was Wray's job that evening to perform this task.

With reference to Wray's absence between 3:00 am and 7:00 am – absence without knowledge of what was happening with the pool – counsel and the ALJ both assert that "Wray was called away on another job relating to the hotel-wide water shut down." (brief, p. 9; ALJ D. p. 30, lines 4-5). The record evidence does not support this. The record instead shows that an outside sprinkler company was in the hotel that evening for repairs that called for shutting the water main down, and that the water main was cut off *prior* to the 3:00 am draining of the pool. [Tr., p. 381]. That project ended earlier than expected, related to a problem with shutting down the water main, and Wray admitted that the water to the hotel was restored by 4:00 am. [Tr., p. 383, 387, 390]. The conclusion that Wray was "called away on another job" is therefore unsupported, and there is no other evidence of what Wray was doing after 3 am.

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D. <u>Dexter Wray's use of vulgar language was appropriately and non-discriminatorily disciplined</u>.

Respondent stands on its assertion and evidence that Wray's use of the word "shit" – in a public area and heard over the radio – is distinguishable from all examples of undisciplined vulgar language presented in this case. First, substantially distinguishing *most* of the examples provided by the AGC, are the facts that Wray's utterance was made in a public area – not in the back of the house amongst only employees – and under circumstances in which it was very likely to have been heard by guests (because it was over the radio). Second, regardless of whether

vulgar language occurs in the front or the back of the house, there was a complaint lodged and it was of course entirely appropriate for this complaint to have been lodged, *especially* as it was likely heard by guests. Having thus been brought to the Hotel management's attention, management could not simply ignore it and not issue a discipline. Vulgar language by employees in the presence of guests in an upscale hotel is a serious matter. This discipline had to be handed out, regardless of Mr. Wray's union affiliation. It surely cannot be said, under Wright Line analysis, that simply because an employee is known to be pro-union he is insulated from discipline for such a serious, well-proven infraction. Further, the discipline was consisted with other discipline; specifically, the two disciplines of Lumni Deskaj.

Counsel for the AGC essentially concedes the foregoing, in line with concession by the ALJ, who ultimately concluded that "at best, Respondent was inconsistent with enforcing its policy." Although Respondent has shown there is no evidence of inconsistency, to the extent one can quibble and attack the edges of Respondent's argument in this regard, the fact remains that Wray plainly committed a clear, proven violation of a clear rule against the use of foul language in a public area around guests.

The fact that the manager who reported him – corporate executive Lorraine Park – herself used a profanity on another occasion is perhaps ironic, but immaterial. Her language was used in the back-of-house service elevator among fellow employees, and the jovial nature of her comment – calling a friendly employee "her favorite bullshitter" – is a far cry from Wray's phrase, uttered in anger over the hotel radio: "I don't need to put up with this shit." One of the ways counsel for the AGC quibbles and attacks the edges of Respondent's position is the assertion that the discipline of Park, as stated in the words of the ALJ, was "devoid of any adverse consequences." This is absurd. A simple reading of this memo, [**Exhibit R-**43], which

was written by the Chief Operating Officer of the company, dispels the ALJ's assertion. This was indeed a serious communication, by one of the company's top executives, expressing clear displeasure with Ms. Park's indiscretion.

Similarly, counsel for the AGC quibbles and attacks the edges of Respondent's position by pointing to the situation in which the general manager used the phrase, "What the hell is going on… where is security?" into the hotel radio. Counsel asserts that the general manager was not called to testify about this incident. Such testimony was unnecessary. It is plain from the testimony of the witness who did describe this incident, Troy Prichicharn, that there was an obvious emergency situation prompting this excited (though *not* yelling) response by the general manager (*see*, Respondent's first brief, p. 17).

E. <u>Wray was appropriately and nondiscriminatorily disciplined for playing on his laptop when he should have been working, and was nondiscrininatorily discharged for the three accumulated serious disciplines</u>.

Counsel for the AGC's endorsement of the ALJ's facile conclusion, that "no one saw Wray gamble," misses the point and ignores the overwhelming circumstantial evidence. Counsel's argument that there were possible "other explanations" that Wray was not playing a game when he should have been working – for example, the ALJ's wispy suggestion that someone may have entered the barely used room and tapped a key on the *hidden-way* laptop, as the explanation for why it was turned on at 9 am (contrary to Wray's assertion that he last used it at 7 am) – does not undermine the compelling circumstantial evidence in the record.

Counsel also continues to argue against the ALJ's admission in evidence of Emmsely's email memo, in which he recorded the times Wray entered and exited the engineering office (**Exhibit R-36**; Tr., pp. 2851-60). These noted time entries were made contemporaneously while

Emmsley watched the security camera playback. The ALJ appropriately allowed the memo in evidence under the best evidence rule, given the testimony that only one copy of the tape was ever made, and was lost (counsel for Respondent also represented on the record to the fruitless search for the tape). [*See*, Tr., pp. 2869-71 and p. 3000]. Having thus been admitted in evidence, it can be attacked only for the weight to be given. The ALJ erred in not giving it considerable weight. As Respondent noted in its first brief, the ALJ carried his prerogative in making credibility resolutions to the extreme, by failing first to see through Mr. Wray's obvious lies, and second by doubting the accuracy and credibility of Emmsely's testimony reporting to simply his contemporaneous notations of what the video showed. It is one thing to resolve a direct dispute between two witnesses on a discrete matter; it is quite another to go as far as the ALJ has here, effectively finding that Emmsley fabricated the time entries out of whole cloth. There is no basis in the record to believe Emmsley did such a thing.

This time record, together with all of the other circumstantial evidence is overwhelming. Dexter Wray, a proven liar, brought a laptop to work (not a tool he uses at any time in his job), and hid it in a dark, barely used room in front of a comfortable chair. That he was actively using this laptop, whether for poker or whatever else, cannot be denied. At 9 am, the laptop was opened on the poker site, and his user ID for the site was displayed in the photos taken at that time (**Exhibits R-4 and R-5**). He used the words "playing poker," when he described two days later what he was doing to his union representative, and then swore to that in his *Jencks* affidavit – only later coming up with the story, at trial, that he had only turned it on to accommodate another employee who had requested he transfer chips. He testified all this happened between 6:30 am and his 7 am shift start, at which time he claimed he left the office, clocked in, and went about his chores elsewhere. The video camera showed, though, no entries by him at all between

6 am and 6:58 am, at which point he entered the office and did not leave until 8:02 am (through the door of the room where the laptop was sitting).

The additional detail supporting this and other items of circumstantial evidence is outlined in Respondent's first brief. The possibility of "other explanations" is simply far too tenuous to overcome the clear preponderance of the evidence that Wray was playing on his laptop when he should have been working.

Respectfully submitted, this 6th day of September, 2013.

s/ Karl M. Terrell
STOKES WAGNER HUNT MARETZ & TERRELL
3593 Hemphill Street
Atlanta, Georgia 30337
Telephone: (404) 766-0076
kterrell@stokeswagner.com

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Reply to the Acting General Counsel's Answering Brief to Respondent's Exceptions was electronically filed with the Executive Secretary's Office via the NLRB website and copies emailed to the counsel of record and individuals listed below:

Dmitri Iglitzen
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 W Mercer Street
Suite 400
Seattle, WA 98119
iglitzin@workerlaw.com

Susannah Merritt
Rachael Cherem
NLRB Region 19
915 2nd Avenue
Room 2948
Seattle, WA 98174-1078
Sussanah.merritt2@nlrb.gov
Rachel.cherem@nlrb.gov

Noah Sunflower
Offices of UNITE-HERE Local 878
530 East 4th Avenue
Post Office Box 100564
Anchorage, AK 99510
noahs@union878.com

Mark Westerberg
UNITE-HERE Local 878
530 East 4th Avenue
Anchorage, Alaska 99501
markw@union878.com

This 6th day of September, 2013.

s/s Karl M. Terrell